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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

OLGA ORTMANN and JUSTIN
 OPYRCHAL, individually, and on
 behalf of all other similarly situated
 current and former employees of
 Defendants in the State of California,

Plaintiff,

v.

NEW YORK LIFE INSURANCE
 COMPANY, INC., a New York
 corporation; NEW YORK LIFE
 INSURANCE AND ANNUITY
 CORPORATION, INC., a Delaware
 corporation; and DOES 1 through 100,
 inclusive, and DOES 1-25, Inclusive,

Defendants.

CASE NO: CV 07-518 VBF (VBKx)

**NOTICE OF MOTION AND
 MOTION FOR PRELIMINARY
 APPROVAL OF CLASS ACTION
 SETTLEMENT; MEMORANDUM
 OF POINTS AND AUTHORITIES**

DATE: October 27, 2008

TIME: 1:30 p.m.

CTRM: 9

**JUDGE: Honorable Valerie
 Baker Fairbank**

Filed concurrently herewith: (1)
 Declarations of Marcus J. Bradley and
 A. Mark Pope; (2) Joint Stipulation of
 Settlement; and (3) [Proposed] Order
 Granting Preliminary Approval of
 Class Action Settlement and Certifying
 Class Action Conditionally for
 Purposes of Settlement

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 27, 2008, at 1:30 p.m., or as soon
3 thereafter as the matter may be heard in the Courtroom 9 before the Honorable
4 Valerie Baker-Fairbank, United States District Court, 312 N. Spring Street, Los
5 Angeles, California 90012, Plaintiffs Olga Ortmann and Justin Opyrchal will
6 respectfully will move this Court for an Order for (1) Preliminary Approval of Class
7 Action Settlement; (2) Certification of a Settlement Class; and (3) Preliminary
8 Approval of Request for Attorneys' Fees and Costs.

9 This Motion is based on the accompanying Memorandum of Points and
10 Authorities in Support of Motion for Preliminary Approval of Settlement, the Joint
11 Stipulation of Settlement, the Declarations of Marcus J. Bradley and A. Mark Pope
12 and exhibits attached thereto, all of the prior pleadings and papers in this action, and
13 upon such additional evidence or argument as may be required by the Court.

14
15 DATED: October 5, 2008

**POPE, BERGER & WILLIAMS
LAW OFFICE OF DOUGLAS CAMPION
LAW OFFICES OF PETER M. HART
MARLIN & SALTZMAN
SCHWARTZ, DANIELS & BRADLEY**

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19 By: 

20 MARCUS J. BRADLEY
21 Attorneys for Plaintiffs and Proposed Plaintiff Class
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Proposed Class Representatives, Plaintiffs Justin Opyrchal and Olga Ortmann (hereinafter referred to as "Plaintiffs" or "Class Representatives"), respectfully submit this Memorandum in support of the parties' Joint Stipulation of Settlement (the "Stipulation"). Pursuant to that Agreement, the parties request that the Court enter an order: (1) preliminarily approving the proposed settlement; (2) preliminarily certifying the proposed Class for purposes of the settlement only; (3) preliminarily certifying Plaintiffs as Class Representatives; (4) directing that the Class be given notice of the pendency of this action and the settlement; and (5) scheduling a hearing to consider final approval of the settlement, entry of a proposed final judgment, and counsels' application for an award of attorneys' fees and reimbursement of costs as well as the service payments to Plaintiffs.

For purposes of the proposed settlement, the Class that the Court is being asked to certify is defined as follows:

All persons who signed a Training Allowance Subsidy Plan Agreement with New York Life Insurance Company or New York Life Insurance and Annuity Corporation in the State of California from December 11, 2002 through the date of Preliminary Approval.

Under the terms, the settlement of \$10,000,000.00 (the "Maximum Settlement Amount") will be paid out regardless of the number of class members making claims. The Maximum Settlement Amount is made up of five parts: (1) the sum of the Claim Amounts, which equals the Settlement Proceeds; (2) attorney's fees and costs to Class Counsel; (3) a Service Payment for each of the Plaintiffs; (4) Settlement Administration Costs; and (5) the Late Claim Reserve. The proposed settlement is set forth in the Stipulation which contains all the material terms of the settlement, including the manner and form of notice to be given to the Class, the contingencies or conditions to the settlement's final

1 approval, and other terms.

2 The proposed settlement described above fulfills the preliminary approval
3 criteria set forth in the Manual for Complex Litigation, 4th Ed. By this Motion,
4 Plaintiffs request that the Court take the first step in the approval process –
5 preliminary approval of the settlement.

6 In determining whether preliminary approval is warranted, the issue before
7 the Court is whether the settlement is within the range of what might be found fair,
8 reasonable and adequate, so that notice of the settlement should be given to Class
9 members, and a hearing scheduled to consider final settlement approval. The
10 Court is not required at this point to make a final determination as to the fairness
11 of the settlement.

12 Since the settlement meets the criteria for preliminary approval and is well
13 within the range of what might be approved as fair, reasonable and adequate,
14 Plaintiffs respectfully request that this Court enter the proposed Preliminary
15 Approval Order, submitted herewith.

16 **II. SUMMARY OF THE LITIGATION**

17 **A. History of Complaint**

18 Opyrchal filed his original complaint in the Los Angeles County Superior
19 Court on December 11, 2006, against New York Life Insurance Company, Inc.,
20 New York Life Insurance and Annuity Corporation, Inc., and New York Life and
21 Health Insurance Company ("NYLHIC"), as case no. BC 363208. New York Life
22 removed the Opyrchal action to the United States District Court, Central District
23 of California, on January 22, 2007 (Defendants shall hereafter be collectively
24 referred to as "New York Life" or "Defendant"). Plaintiff Opyrchal subsequently
25 dismissed NYLHIC. New York Life filed a motion to dismiss and a motion to
26 strike that resulted in the dismissal of Opyrchal's claims for punitive damages and
27 injunctive relief.
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1 Ortmann filed her complaint against New York Life in the Alameda County
2 Superior Court on March 26, 2007, as case no. RG07317476. New York Life
3 removed the Ortmann action to the United States District Court, Northern District
4 of California, on May 19, 2007. New York Life filed a motion to stay or transfer
5 the action, motion to dismiss, and motion to strike. Ortmann subsequently
6 dismissed her action without prejudice and joined the Opyrchal action as a named
7 plaintiff. Ortmann and Opyrchal filed the operative Second Amended Complaint
8 ("SAC") on July 23, 2007.

9 **B. Claims and Causes of Action**

10 The SAC asserts claims for failure to pay minimum wage (first cause of
11 action), based on the allegation that, while in training, TAS Agents (as defined in
12 Section 1.39 of the Stipulation) were not eligible for the outside sales exemption
13 and therefore were entitled to minimum wage and other benefits of non-exempt
14 employees. The SAC further asserts claims for failure to indemnify and reimburse
15 for business expenses and unlawful deductions from wages, including but not
16 limited to, requiring TAS Agents to pay monthly rent on a cubicle, pay monthly
17 telephone service charges, pay for required specialized software and technical
18 support for that software as a monthly charge, pay copy charge fees, and failing to
19 reimburse for business expenses, e.g., mileage, laptop computers, and office
20 supplies (second cause of action). The SAC further claims a failure to provide
21 properly itemized wage statements (third cause of action), wages untimely paid at
22 the time of termination (fourth cause of action), compelling or coercing TAS
23 agents to patronize New York Life by paying rent for cubicles, charges for
24 telephone service, surcharges for copying, and purchase of insurance policies,
25 among others (fifth cause of action). The SAC further claims that New York Life
26 asserts claims for unfair business practices (sixth cause of action), and unlawful
27 business practices (seventh cause of action). These claims are brought under
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1 Labor Code sections 200 to 203, 218.6, 221, 223, 226, 450, 451, 1171, 1194,
2 1194.2, and 2802 et seq., IWC Wage Order 4-2001, and Business & Professions
3 Code sections 17200 et seq.

4 **C. Discovery**

5 During the course of the litigation, the parties have conducted substantial
6 formal discovery. Plaintiffs' counsel reviewed thousands of pages documents
7 either produced by Defendant or obtained by counsel through other sources.
8 These documents provided counsel with a critical understanding of the nature of
9 the work done by Class Members, and were used in analyzing liability and damage
10 issues in connection with the mediation process.

11 Both of the Named Plaintiffs had their depositions taken. Additionally,
12 Plaintiffs' counsel traveled to New York to take the depositions of multiple New
13 York Life executives. Plaintiffs' counsel were also provided with Class Member
14 ledger data which was provided to an expert statistician. The expert performed a
15 series of calculations regarding potential damages which was relied on by
16 Plaintiffs' counsel at the mediation.

17 **D. Contact with Class Members**

18 Class counsel sent letters to approximately 1800 class members informing
19 them of the nature of the lawsuit and requesting that they contact Class Counsel to
20 the discuss the case. Thereafter, Class Counsel spoke with a significant number of
21 Class members, most of whom provided vital information concerning the nature of
22 the work they performed while employed by Defendant and the claimed expenses
23 that they incurred as well as claimed business deductions made by Defendant. The
24 information obtained assisted Class Counsel in establishing a statistical basis for
25 determining a reasonable estimate of the amount of damages claimed to be owed
26 to the Class as a whole. This information proved invaluable in negotiations with
27 Defendant in reaching a settlement that Plaintiffs believe properly and adequately
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1 compensates Class members for their claims.

2 The representative Plaintiffs also provided valuable assistance to Class
3 Counsel in the prosecution of this matter in connection with understanding the
4 functions of New York Life insurance agents, the training involved and the
5 claimed amount of business expenses incurred.

6 **III. THE SETTLEMENT PROCESS**

7 The settlement process in this matter has been conducted over a substantial
8 number of months. Throughout the litigation process, both sides looked for
9 appropriate opportunities to engage in meaningful settlement discussions. Once
10 the primary liability discovery had been completed and the pleadings resolved,
11 both sides agreed to mediation.

12 A mediation was held in Los Angeles with Lynne Frank, a highly regarded
13 mediator with an expertise wage and hour class actions. During the mediation, the
14 Plaintiffs and Proposed Class were represented by five attorneys, each of whom
15 was charged with being prepared to respond to Defendant's arguments concerning
16 a variety of issues (i.e., liability issues, expenses, deductions, etc.) In addition, an
17 expert relating to Plaintiffs' damage calculations was on standby in his office in
18 San Diego to assist Plaintiffs' counsel at the mediation. The mediation included
19 discussion and examination of the Parties' respective positions on the legal and
20 factual issues raised by the SAC.

21 The mediator-conducted settlement discussions were ultimately successful.
22 A basic settlement agreement was reached, with the specific details of
23 implementation and notice wording, etc., left for direct negotiations between the
24 parties.

25 The parties have continued to engage in negotiations in order to finalize the
26 formal Settlement Agreement which is the subject of this Motion. These further
27 negotiations have been arduous, and have literally dealt with every issue of the
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1 settlement terms and conditions. This has included literally hundreds of telephone
2 calls, e-mail, and numerous draft versions of various documents. At all times, the
3 Parties' settlement negotiations have been non-collusive, adversarial, and at arm's
4 length. The Parties agree that the above-described investigation and evaluation, as
5 well as discovery and the information exchanged during the settlement
6 negotiations, are more than sufficient to assess the merits of the respective Parties'
7 positions and to compromise the issues on a fair and equitable basis.

8 **IV. SUMMARY OF SETTLEMENT**

9 The parties have entered into the Settlement Agreement which completely
10 resolves the above-captioned action against the Defendant. Defendant has agreed
11 to a non-reversionary \$10,000,000.00 settlement. If the settlement is approved by
12 the Court, the above-captioned action will be dismissed, with prejudice, and
13 Defendant will receive a release of claims as set forth in the Stipulation.

14 As a part of the settlement, the parties have agreed to the certification of a
15 Settlement Class defined as:

16 All persons who signed a Training Allowance Subsidy Plan
17 Agreement with New York Life Insurance Company or New York
18 Life Insurance and Annuity Corporation in the State of California
19 from December 11, 2002 through the date of Preliminary Approval.

20 The Settlement Proceeds and Late Claims Fund will be distributed to
21 Settlement Class Members pursuant to the claim procedure, as set forth in the
22 Stipulation, which fairly allocates the net proceeds of the settlement to members of
23 the Settlement Class who submit complete Claim Forms.

24 Each Settlement Class Member who submits complete Claim Form will
25 receive a pro rata share of the Settlement Proceeds. As a non-reversionary
26 settlement, all of the Maximum Settlement Amount will be paid to the class after
27 the payment of Court-approved attorneys' fees, costs, Settlement Administration
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1 Costs, and Class Representative Service Payments. After the settlement has been
 2 finally approved by the Court, the settlement proceeds will be distributed to
 3 claimants pursuant to the terms of the Settlement.

4 The Court is requested to appoint Pope, Berger & Williams, LLP, Marlin &
 5 Saltzman, Schwartz, Daniels & Bradley, Law Offices of Douglas J. Campion, and
 6 Law Offices of Peter Hart as class settlement counsel ("Class Counsel") with
 7 respect to all members of the Settling Class. In addition, the Court is asked to
 8 appoint Justin Opyrchal and Olga Ortmann as Representative Plaintiffs.

9 **V. PRELIMINARY SETTLEMENT APPROVAL**

10 **A. The Settlement Should Be Preliminarily Approved.**

11 Federal Rule of Civil Procedure 23(e) provides that any compromise of a
 12 class action must receive Court approval. In determining whether a proposed
 13 settlement should be approved, the Ninth Circuit has a "strong judicial policy that
 14 favors settlement, particularly where complex class action litigation is concerned."
 15 *In re Heritage Bond Litigation*, 2005 WL 1594403, citing *Class Plaintiffs v.*
 16 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). This policy is driven by "an
 17 overriding public interest in settling and quieting litigation. . . [t]his is particularly
 18 true in class action suits which are now an ever increasing burden to so many
 19 federal courts and which frequently present serious problems of management and
 20 expense." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

21 This approval "involves a two-step process in which the Court first
 22 determines whether a proposed class action settlement deserves preliminary
 23 approval and then, after notice is given to class members, whether final approval is
 24 warranted." *Nat'l Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221
 25 F.R.D. 523, 524 (C.D. Cal. 2004), citing *Manual of Complex Litigation*, Third, §
 26 30.41 at 236-37 (1995). See also *Colesberry v. Ruiz Food Products, Inc.*, 206 WL
 27 187444, *6 (E.D. Cal. 2006), citing *In re Jiffy Lube Sec. Litigation*, 927 F.2d 155,
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1 158 (4th Cir. 1991) (“The court ordinarily holds a preliminary hearing to
 2 determine whether there is a likelihood it could approve the settlement before
 3 conducting a full ‘fairness hearing’”).

4 At the preliminary approval stage, the Court need only “determine whether
 5 the proposed settlement is within the range of possible approval.” *Gatreaux v.*
 6 *Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982). Ultimately, a class action should be
 7 approved if “it is fundamentally fair, adequate and reasonable.” *Class Plaintiffs v.*
 8 *Seattle*, 955 F.2d at 1276. See also *Officers for Justice v. Civil Service Comm’n of*
 9 *the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (“the
 10 court’s intrusion on what is otherwise a private consensual agreement negotiated
 11 between parties to a lawsuit must be limited to the extent necessary to reach a
 12 reasoned judgment that the agreement is not the product of fraud or overreaching
 13 by, or collusion between, the negotiating parties, and that the settlement, taken as a
 14 whole, is fair, reasonable and adequate to all concerned”). There is further a
 15 “strong initial presumption that the compromise is fair and reasonable.” *In re*
 16 *Microstrategy, Inc. Sec. Litigation*, 148 F.Supp.2d 654, 663 (E.D. Va. 2001).

17 Although at this stage of preliminary approval, the Court is not expected to
 18 engage in the more rigorous analysis as is required for final approval (see *Manual*
 19 *for Complex Litigation*, Fourth, § 22.661 at 438 (2004)), the Court’s ultimate
 20 fairness determination will include balancing several factors, including some or all
 21 of the following:

22 . . . the strength of plaintiffs’ case; the risk, expense, complexity and
 23 likely duration of further litigation; the risk of maintaining class
 24 action status throughout the trial; the amount offered in settlement;
 25 the extent of discovery completed, and the stage of the proceedings;
 26 the experience and the stage of the proceedings; the experience and
 27 views of counsel; the presence of a governmental participant; and the
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1 reaction of the class members to the proposed settlement.

2 *Officers for Justice*, 688 F.2d 625. Not all of the above factors apply to
 3 every class action settlement, and one factor alone may prove determinative in
 4 finding sufficient grounds for court approval. *Nat'l Rural*, 221 F.R.D. at 525-26.
 5 District courts have wide discretion in assessing the weight and applicability of
 6 each factor. *Id.*

7 **B. The Settlement Agreement Resulted from Arm's Length Negotiations.**

8 There is an initial presumption that a proposed settlement is fair and
 9 reasonable when it is the result of arm's length negotiations. See *Williams v.*
 10 *Vukovich*, 720 F.2d 909, 922-923 (6th Cir.1983) ("The court should defer to the
 11 judgment of experienced counsel who has competently evaluated the strength of
 12 his proofs"); *In re Excess Value Ins. Coverage Litig.*, No. M-21-84 (RMB) 2004
 13 U.S. Dist. LEXIS 14822, at *34 (S.D.N.Y. July 30, 2004) ("Where 'the Court
 14 finds that the Settlement is the product of arm's length negotiations conducted by
 15 experienced counsel knowledgeable in complex class litigation, the Settlement
 16 will enjoy a presumption of fairness'"); *In re Inter-Op Hip Prosthesis Liab. Litig.*,
 17 204 F.R.D. 359, 380 (N.D. Ohio 2001) (granting preliminary settlement approval)
 18 ("when a settlement is the result of extensive negotiations by experienced counsel,
 19 the Court should presume it is fair"); see also 2 *Herbert Newberg & Alba Conte*,
 20 *Newberg on Class Actions* §11.24 (4th Ed. & Supp. 2002); *Manual For Complex*
 21 *Litigation* (Fourth) §30.42.

22 The proposed settlement here is the product of hours of arm's length
 23 negotiations over the course of many weeks between counsel for Plaintiffs and
 24 counsel for Defendant. The parties have conducted significant investigation of the
 25 facts and law during the prosecution of this action. Such investigations have
 26 included, inter alia, the exchange of a significant amount of information;
 27 numerous meetings and conferences between representatives of the parties; and
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1 interviews of potential witnesses. Counsel for the parties have further investigated
2 the applicable law as applied to the facts discovered regarding the alleged claims
3 of Plaintiffs and potential defenses thereto, and the damages claimed by Plaintiffs.

4 In pertinent part, Plaintiffs claim that Defendant failed to pay Plaintiffs for
5 all time spent in mandatory training and for all expenses incurred as required by
6 California state law. Additionally, Plaintiffs believe that Defendant has deducted
7 from Plaintiffs' compensation certain business expenses not allowed by California
8 law. Among other defenses, New York Life contends that the Class Members
9 were and are properly classified as exempt under the outside sales exemption, and
10 that therefore the claim for minimum wage and other related claims have no merit.
11 In addition, New York Life contends that various expenses sought by Plaintiffs
12 were not incurred or were not reasonable necessary expenditures and the alleged
13 deductions at issue were a permissible component of a commission calculation and
14 did not violate applicable state law. New York Life also contends that it had an
15 expense allowance plan in place to reimburse for reasonable and necessary
16 business expenses. New York Life denies that it compelled or coerced TAS
17 Agents to purchase insurance policies. New York Life also contends that the
18 action was not suitable for class certification.

19 Plaintiffs' counsel appreciate the defenses and position of Defendant, but
20 believes Plaintiffs would ultimately succeed in the action. Defendant, on the other
21 hand, continues to contend it compensated Plaintiffs in accordance with California
22 law.

23 The parties were able to negotiate a fair settlement, taking into account the
24 costs and risks of continued litigation. The negotiations were at all times
25 conducted professionally and at arm's length, and have produced a result that the
26 parties believe to be in their respective best interests. The opinion of experienced
27 counsel, as here, supporting the settlement is entitled to considerable weight. *In re*
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1 *First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL Docket No. 901 All
 2 Cases, 1992 U.S. Dist. LEXIS 14337, at *8 (C.D. Cal. June 10, 1992) (finding
 3 belief of counsel that the proposed settlement represented the most beneficial
 4 result for the class to be a compelling factor in approving settlement); *Kirkorian v.*
 5 *Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988) (opinion of experienced counsel is
 6 entitled to considerable weight); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622
 7 (N.D. Cal. 1979) (recommendations of plaintiffs' counsel should be given a
 8 presumption of reasonableness).

9 Plaintiffs have also taken into account the uncertainty and risk of the
 10 outcome of further litigation, and the difficulties and delays inherent in such
 11 litigation. Plaintiffs are also aware of the burdens of proof necessary to establish
 12 liability for the claims asserted in the action (the "Claims" or "Class Action
 13 Claims"), Defendant's defenses thereto, and the difficulties in establishing
 14 damages.

15 Based on the foregoing, Plaintiffs have determined that the settlement set
 16 forth in the Stipulation is a fair, adequate and reasonable settlement, and is in the
 17 best interests of Plaintiffs and the Proposed Plaintiff Class. Defendant is confident
 18 that it has strong legal and factual defenses to the Claims, but it recognizes the
 19 risks, distractions, and costs associated with litigation. In light of this, the
 20 Settlement is a compromise and is not an admission of liability on the part of
 21 Defendant. Both sides agree that in light of the risks and expenses associated with
 22 continued litigation, this Settlement is fair and appropriate under the
 23 circumstances, and in the best interests of the Class Members.

24 **VI. THE SETTLEMENT HAS NO OBVIOUS DEFICIENCIES**

25 The proposed settlement has no obvious deficiencies. Under the terms of
 26 the settlement, Defendants has agreed to create a fund consisting of a maximum of
 27 \$10,000,000.00. The settlement provides no preferential treatment for Plaintiffs or
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1 other Class members. Plaintiffs will receive distributions from the settlement
 2 proceeds calculated in the same manner as the distributions to all other Class
 3 Members. Moreover, the settlement does not mandate excessive compensation for
 4 Plaintiffs' counsel. Plaintiffs' counsel is authorized to apply for an award of
 5 attorneys' fees not to exceed thirty percent (30%) percent of the Settlement Fund,
 6 and reimbursement of expenses, and any award of fees and expenses is subject to
 7 Court approval.

8 The settlement has been reached after considerable negotiation and after the
 9 mediation efforts of a highly experienced mediator. Each side evaluated the
 10 strengths and weaknesses of its case and independently came to the conclusion
 11 that this settlement represents a responsible means of addressing the claims of the
 12 Plaintiffs and the defenses of the Defendant. Given the foregoing, the settling
 13 parties evaluated and considered all alternatives in reaching their settlement
 14 decisions and now urge this Court to grant preliminary approval.

15 **VII. APPLICATION FOR CERTIFICATION OF CLASS FOR** 16 **SETTLEMENT PURPOSES**

17 The preliminary approval process is also utilized to certify a settlement class
 18 when a class has not been previously certified by the court. The court can certify a
 19 class where plaintiffs demonstrate that the proposed class and proposed class
 20 representatives meet the four prerequisites in Federal Rules of Civil Procedure,
 21 Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation
 22 – and one of the three requirements of Federal Rules of Civil Procedure, Rule
 23 23(b).

24 Here, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil
 25 Procedure, and for the purposes of settlement only, the Named Plaintiffs seek
 26 preliminary certification of a class of:

27 All persons who signed a Training Allowance Subsidy Plan
 28

1 Agreement with New York Life Insurance Company or New York
2 Life Insurance and Annuity Corporation in the State of California
3 from December 11, 2002 through the date of Preliminary Approval.

4 As detailed below, the prerequisites for a class action under Rules 23(a) and
5 (b)(3) of the Federal Rules of Civil Procedure have been satisfied in this action.

6 1. Numerosity – The numerosity requirement is satisfied if the proposed
7 class is “so numerous that joinder of all members is impracticable.” Fed.R.Civ.P.
8 Rule 23(a)(1). Impracticable does not mean impossible, only that it would be
9 difficult or inconvenient to join all members of the class. *Harris v. Palm Springs*
10 *Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964.) Here, investigation and
11 disclosure by Defendant revealed approximately 2000 potential class members.
12 Therefore, numerosity is satisfied.

13 2. Commonality – Commonality relates to whether there are “questions
14 of law or fact common to the class.” Fed.R.Civ P. Rule 23(a)(2). Commonality is
15 satisfied if there is one issue common to class members. *Hanlon v. Chrysler*
16 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998.) Here, Plaintiffs submit that common
17 issues include: Whether Plaintiffs were properly classified as exempt during
18 mandatory training time; whether Defendant reimbursed Plaintiffs for reasonable
19 and necessary business expenses; and whether deductions were made by
20 Defendant for reasonable necessary business expenses. These issues satisfy
21 commonality.

22 3. Typicality – Typicality under Rule 23(a)(3) is satisfied if the
23 representative plaintiff’s claims share a common element with the Class because
24 they arise from the same course of conduct that gave rise to the claims of other
25 Class members. *In re United Energy Corp. Solar Power Modules Tax Shelter Inv.*
26 *Sec. Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988.) Plaintiffs submit that their
27 claims are typical of those of other Class members because, like other members of
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1 the Class, they contend that they were not compensated for mandatory training
2 time and were not reimbursed for all business expenses. Additionally, Plaintiffs
3 had similar deductions made by Defendant from their compensation during the
4 Settlement Class Period and contend that these deductions were improper and
5 were damaged thereby.

6 4. Adequacy of Representation – Adequacy under Rule 23(a)(4) is
7 satisfied if the named plaintiff has no disabling conflicts of interest with other
8 members of the class and plaintiff's counsel are competent and well qualified to
9 undertake the litigation. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507,
10 512 (9th Cir. 1978.) Here, the Plaintiffs are represented by counsel who have
11 extensive experience in complex litigation and have protected the interests of the
12 Class. (See Declarations of Marcus J. Bradley and A. Mark Pope)

13 Additionally, no conflict exists between the Plaintiffs and the members of
14 the Class because the Plaintiffs claims to have been damaged by the same alleged
15 conduct and have the incentive to fairly represent all Class Members' claims to
16 achieve the maximum possible recovery.

17 5. Questions of Law and Fact Predominate – Plaintiffs submit that that
18 common questions of law or fact predominate over individual questions pursuant
19 to Rule 23(b)(3) in that the issues of fact and law raised in this action are common
20 to all members of the Class and will predominate in this case. In this case,
21 Plaintiffs allege, and Defendant disputes, that Defendant failed to pay Plaintiffs for
22 all time spent in mandatory training and for all expenses incurred as required by
23 California state law. Additionally, Plaintiffs contend, and Defendant disputes, that
24 Defendant has deducted from Plaintiffs' compensation certain business expenses
25 not allowed by California law. Because there are common issues, this requirement
26 is satisfied. Proof of that common course of conduct would establish Defendant's
27 liability as to all members of the Class.

1 6. Superiority of Class Action – The requirement that a class action is
2 superior to other methods of adjudication under Rule 23(b)(3) is also met. Courts
3 have recognized that the class action device is superior to other available methods
4 for the fair and efficient adjudication of controversies involving large number of
5 employees in wage and hour disputes.

6 Based upon the Stipulation of the parties, it is respectfully requested that the
7 Court certify the Class as defined herein for settlement purposes only.

8 In the event final approval of the settlement is not granted, the parties will
9 occupy the same legal posture that they occupied at the outset of the litigation and
10 be free to assert any claim or defense that they could have asserted at the outset of
11 the litigation.

12 **VIII. APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS**

13 As part of the request for Final Approval of this settlement, Plaintiffs'
14 counsel will seek an award of attorneys' fees of \$3,000,000.00. Additionally,
15 Plaintiffs seek reimbursement of Court approved costs approximating \$29, 942.89.
16 Defendant will not object to this request. As noted above, the Settlement Sum of
17 \$10,000,000 is a non-reversionary fund, with no funds returning to Defendant.
18 The attorneys' fees sought are based on this true fund.

19 While it is sometimes considered as a "common practice" for an attorney fee
20 application in a class action to be made only in connection with the Final Fairness
21 hearing, the counsel representing the Plaintiff in this matter have traditionally
22 presented the Court with some preliminary argument and information concerning
23 the fee application as a courtesy to the Court. Since Federal Rules of Civil
24 Procedure, Rule 23, requires that the Class be given notice of the agreement of the
25 parties that Plaintiffs' counsel will seek a \$3,000,000.00 fee and that Defendant
26 will not oppose such application, it is thought that seeking preliminary approval of
27
28

1 the requested fees is the more appropriate course of conduct.¹

2 Class Counsel now apply to the Court for a contingent award of attorneys'
3 fees in an amount equal to thirty (30%) percent of the Settlement Fund. This
4 percentage award is commensurate with (1) the risk Class Counsel took in
5 commencing this action; (2) the time, effort and expense dedicated to the case; (3)
6 the skill and determination they have shown; (4) the results they have achieved
7 throughout the litigation; (5) the value of the settlement they have achieved for
8 Class members; and (6) the other cases counsel have turned down in order to
9 devote their time and efforts to this matter.

10 The obvious risk, at the time this case was commenced, was that the theory
11 of recovery raised by Plaintiffs and their counsel would prove to be invalid. In
12 addition, counsel knew that they would be challenging a major corporation.
13 Counsel believed that obtaining a remedy would be anything but easy.

14 Class Counsel faced risk and difficulty on numerous levels. It was clear
15 from the outset that this case would be hotly contested and that significant
16 manpower would be needed to litigate the case properly.

17 The governing principles, as well as a survey of attorney fee jurisprudence
18 (both in California and throughout the country) reveal that trial courts have "wide
19 latitude" in assessing the value of attorneys' fees and their decisions. Class
20 Counsel seek a fee award for their successful prosecution and resolution of this
21 action, calculated as a percentage of the total value of benefits afforded the Class
22 members by the settlement. *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478;
23 see also *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) The
24 purpose of this equitable doctrine is not only to avoid unjust enrichment of
25 counsel but also to spread litigation costs proportionally among all the
26

27 ¹Again, this is a request for preliminary approval. A more detailed application will be made
28 at te time of the Final Fairness hearing.

beneficiaries so that the active beneficiary does not bear the entire burden alone. *Vincent v. Hughes Air West, Inc.*, *supra*, 557 F.2d at 769. Where the amount of a settlement is a “certain easily calculable sum of money,” California courts may calculate attorney fees as a reasonable percentage of the settlement created. Weil and Brown, *California Practice Guide, Civil Procedure Before Trial*, Chapter 14, §14:145; *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1808.

The goal in a case such as this is to set a fee that approximates the probable terms of a contingent fee contract negotiated by a sophisticated attorney and client in comparable litigation. A review of class action settlements over the past ten years shows that the courts have historically awarded fees in the range of 20% to 50%, depending upon the circumstances of the case. Class Counsel’s requested fee comes to 30%, a percentage well within the range of reasonableness. In discussing the range of fees, Judge Marilyn Patel stated in the *Activision* litigation:

In re Warner Communications Sec. Lit. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50, Judge Keenan concluded that the fees range from 20% to 50%. The average of the fees in the sixteen cases listed in Warner is 30.6%.

In re Activision Securities Litigation (N.D. Cal. 1989) 723 F.Supp. 1373, 1378.

Professor Newberg is in accord:

No general rule can be articulated on what is a reasonable percentage of a common fund. **Usually 50% of the fund is the upper limit** on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.

Newberg, *Newberg on Class Actions*, 4th Ed., 2002, vol. 4, p. 550.

1 The *Warner* case, *Newberg on Class Actions*, and other authorities in
2 various Federal judicial circuits all support the conclusion that fees between 20%
3 and 50% of a common fund have normally been awarded over the past several
4 years.

5 It is respectfully requested that the Court grant preliminary approval to the
6 request for attorneys' fees as noted herein. In addition, at the time of the Final
7 Fairness hearing, Class Counsel will present a detailed cost breakdown and
8 request for reimbursement of the same.

9 **IX. NATURE AND METHOD OF CLASS NOTICE**

10 "For any class certified under Rule 23(b)(3), the court must direct to class
11 members the best notice practicable under the circumstances, including individual
12 notice to all members who can be identified through reasonable effort."
13 *Fed.R.Civ.P.* Rule 23(c)(2)(B). "The court must direct notice in a reasonable
14 manner to all class members who would be bound by a proposed settlement,
15 voluntary dismissal or compromise." *Fed.R.Civ.P.* Rule 23(e)(B).

16 The parties have agreed upon a form of Notice of Settlement (Exhibit B to
17 the Joint Stipulation of Settlement). The Notice shall be sent by the claims
18 administrator to the Class, by first class mail, within thirty (30) days after entry of
19 the order granting preliminary approval of the settlement and notice. The actual
20 dates to be inserted in the Notice will be adjusted, as necessary, to give Class
21 Members sixty (60) days within which to submit their claims and sixty (60) days
22 within which to file and serve written objections to the settlement. The claims
23 administrator will conduct a search using the U.S. Postal Service National Change
24 of Address database to validate or update the addresses of the Class Members who
25 are former TAS Agents of New York Life before to sending Class Notice, and
26 appropriate skip tracing as to any returned notices to ensure that the Notice and
27 Claim Form are sent to all Class Members.

1 Moreover, the parties have agreed that the Claims Administrator shall, in its
2 discretion, to utilize the services of a private investigator to locate class members
3 who are not otherwise found through the skip tracing process used by the Claim
4 Administrator. The cost of such extraordinary efforts, up to a maximum of \$400,
5 shall be deducted from the located class member's Claim Share, not from the
6 Settlement Fund. The Claims Administrator will utilize only a private investigator
7 who will perform these services on a contingency basis such that if the class
8 member is not located there will be no charge. (See Section 10.11 of the
9 Stipulation).

10 The Notice will be accompanied by a Claim Form (Exhibit A to the Joint
11 Stipulation of Settlement). The Claim Form for each Class Member will reflect
12 the total number of weeks of service as a TAS Agent of the Class Member during
13 the Class Period as shown by New York Life's records and the gross amount of
14 the Estimated Claim Amount for the individual Class Member, before state and
15 federal tax withholdings. (See Section 10.4 of the Stipulation).

16 In order to increase participation, 45 days after the Claims Administrator
17 mails the Notice Packets to Class Members, Class Counsel may direct the Claims
18 Administrator to place one telephone call to specified Class Members who have
19 not submitted a Claim Form, or who have not corrected a deficient Claim Form.
20 During this call, the Settlement Administrator will follow a script approved by
21 Defendants' Counsel and Class Counsel. If the Claims Administrator does not
22 reach the Class Member, the Claims Administrator shall attempt to leave a
23 message with a return phone number. If the Class Member requests any
24 information about the settlement, the Claims Administrator will provide that
25 information. (See Section 10.16 of the Stipulation).
26
27
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1 The Notice of Settlement will include a website address for a website
2 created by and maintained by the Claims Administrator. The website will include
3 information about the settlement and a copy of the Second Amended Complaint,
4 the Joint Stipulation of Settlement, and the Notice of Settlement. (See Section 10.6
5 of the Stipulation).

6 Finally, a Late Claim Reserve in the amount of forty thousand dollars
7 (\$40,000.00) shall be set aside to cover the payment of Late Claims. Any Class
8 Member who submits a Late Claim shall be entitled to a Late Claim Amount as if
9 his or her claim had not been late, and computed on the same basis as if it
10 represented a share from the Settlement Proceeds, except that (i) all Late Claims
11 shall be paid solely from the Late Claim Reserve; and (ii) the total paid for all such
12 Late Claims shall not exceed the amount of the Late Claim Reserve. If the total of
13 the Late Claim Amounts exceed the Late Claim Reserve, all Late Claim Amounts
14 shall be reduced proportionately so that the total paid to Class Members
15 submitting Late Claims does not exceed \$40,000.00. If the total of the Late Claim
16 Amounts is less than \$40,000, the undistributed portion of the Late Claim Reserve
17 shall be distributed pursuant to Code of Civil Procedure Section 384 to the United
18 Way.

19 **X. CLASS ADMINISTRATION**

20 Plaintiff seeks the appointment of Rosenthal & Co. as the Claims/Class
21 Administrator. Rosenthal & Co. is one of the most experienced class
22 administration companies in the country and had acted as claims administrator in
23 hundreds of wage and hour cases throughout the country.

24 **XI. REQUEST FOR SERVICE PAYMENT**

25 Plaintiffs have assisted Class Counsel in the prosecution of this action.
26 They have provided the names of witnesses and have provided insight and
27 information to Class Counsel that has proven to be invaluable.
28

1 Plaintiffs responded to written discovery. Importantly, both Plaintiff
 2 Ortmann and Plaintiff Opyrchal had their depositions taken and spent significant
 3 time preparing for these depositions.

4 Service Payments for representative plaintiffs are granted by the courts. For
 5 example, in *Enterprise Energy Corp. vs. Columbia Gas Transportation Corp.*
 6 (S.D. Ohio 1991) 137 F.R.D. 240, 250-251, each representative plaintiff was
 7 granted a \$50,000.00 incentive award in a settlement significantly smaller than the
 8 one before this Court. See also, *In re Dunn & Bradstreet Credit Services*
 9 *Customer Litigation* (S.D. Ohio 1990) 130 F.R.D. 366, where the various
 10 representative plaintiffs received incentive awards ranging from \$35,000.00 to
 11 \$55,000.00.

12 Plaintiffs, for whom a Service Payment is being requested, have assisted
 13 Class Counsel in the litigation of this case. The court is being asked to approve
 14 that they receive, in addition to their actual award, a Service Payment of
 15 \$25,000.00. Defendant will not object to such awards.

16 **XII. FINAL APPROVAL HEARING**

17 Plaintiffs request that the Final Fairness Hearing be set between February
 18 23, 2009 and March 9, 2009, depending on the actual date that the class notice is
 19 sent to the class members. This will permit the Claims Administrator to mail the
 20 notice, and for Class Counsel to prepare a report concerning any response to the
 21 same prior to the hearing.

22 **XIII. CONCLUSION**

23 Counsel for the parties have reached this settlement following extensive
 24 discussions and arm's length negotiations. The Court need not determine at this
 25 stage whether the settlement is fair, reasonable and adequate. The Court is merely
 26 being asked to permit notice of the terms of the settlement to be sent to the Class
 27 and to schedule a final settlement hearing to consider the fairness of the
 28

1 settlement, entry of a proposed final judgment, and counsels' request for an award
2 of fees and reimbursement of expenses. Plaintiffs respectfully request that the
3 Court grant preliminary approval of the proposed settlement and enter the
4 proposed Preliminary Approval Order submitted herewith.
5

6 DATED: October 5, 2008

7 POPE, BERGER & WILLIAMS
8 LAW OFFICE OF DOUGLAS CAMPION
9 LAW OFFICES OF PETER M. HART
10 MARLIN & SALTZMAN
11 SCHWARTZ, DANIELS & BRADLEY

12 By: 

13 MARCUS J. BRADLEY

14 Attorneys for Plaintiffs and Plaintiff Class
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